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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1470

DELTA AIR LINES, INC.,
v. *Petitioner,*

CIVIL AERONAUTICS BOARD,
Respondent,

COMMITTEE OF FORMER NORTHEAST STEWARDESSES,
Respondent.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF OF RESPONDENT COMMITTEE
OF FORMER NORTHEAST STEWARDESSES
IN OPPOSITION**

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The Respondent, Committee of Former Northeast Stewardesses, respectfully opposes the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit dated January 20, 1978.

This Respondent was the original Petitioner before the Civil Aeronautics Board and obtained the Order on Remand of September 23, 1976 (Appendix to Petition, 1c) which resulted in the appeal below. The Committee of

Former Northeast Stewardesses was granted leave to intervene in the United States Court of Appeals for the District of Columbia Circuit by Order dated November 4, 1976.

QUESTION PRESENTED

The Petitioner stated the issue improperly by inserting disputed facts. In Issue (1) the following phrase is included, ". . . when the request for arbitration undisputedly came many months after the time limits for seeking arbitration had run . . ." This is incorrect and in fact is the criteria utilized by the Civil Aeronautics Board to refer the issue of timely demand to the Arbitrator as the threshold question.

The question presented should be stated as follows:

Whether the Civil Aeronautics Board may refer a seniority dispute arising out of an airline merger to arbitration, and include therein a question as to whether the party made timely demand for arbitration?

The United States Court of Appeals for the District of Columbia Circuit stated the issue in the following manner:

"The basic question before this Court is whether the Board used its discretion by referring to the arbitrator the procedural issue of timeliness of the request for arbitration, rather than deciding that issue on the record before it." (Appendix to Petition, 2a)

STATEMENT OF THE CASE

The Petitioner distorts the facts of the case by asserting that, "It was (and is) undisputed that the Committee seeking arbitration did not request it until the Spring of 1974." (Petition, p. 3)

This is not a fact, and was the initial question for the Arbitrator in accordance with the referral by the

Civil Aeronautics Board. The Board's Order on Remand dated September 23, 1976 held as follows:

"On the record before us, we are unable to definitively resolve these and other questions pertinent to the merits of Delta's argument that the arbitration provisions are untimely invoked. In some part, the record is short on reliable facts . . ."

"In light of the above, we believe that the wisest course to follow in furtherance of the Court of Appeals' ruling will be to order arbitration but to include in the arbitrator's mandate a jurisdictional question. Specifically, the arbitrator is to determine, as an initial matter . . . whether, under all the circumstances, the claim to arbitration was asserted within a reasonable time." (Appendix to Petition, 7c-8c)

Throughout the Petitioner's "Statement of Facts", Delta continues to assert that it did not receive any complaints from any stewardess and further, that it received no request for arbitration for many months after the merger. (See variously Petitioner's Brief, pp. 5 & 7).

The record clearly establishes that this assertion is false and that the Northeast Committee made demand for arbitration to Delta Air Lines as early as September 28, 1972. The Arbitrator's Opinion and Award dated June 1, 1977 clearly responds to this assertion. Accordingly to the decision of Arbitrator Harry Platt:

"Like the CAB, the Arbitrator would consider Delta's recital of the facts, "if true to be dispositive of the question of timeliness" . . . The crux of Delta's position, as recited both to the CAB and in these proceedings is that, "No formal complaint and request was received by Delta until April 5, 1974, or some twenty months after the merger became effective." *However, this assertion was demonstrably incorrect.* (Opinion and Award, p. 22. Emphasis supplied)

Arbitrator Platt further found:

"Delta had actual knowledge that the negotiating committee, which rightfully represented the stewardesses considered negotiations to have deadlocked and wanted to arbitrate." (p. 25)

* * *

"Shared, if not primary responsibility for such delay must be assigned, in the first instance, to Delta and the company may not interpose such delay as a bar to arbitration at this time. (p. 27)¹

ARGUMENT

The very basic issue here is whether the Civil Aeronautics Board abused its discretion by ordering arbitration of the timeliness question, particularly in view of the conflicting assertions in the record before the Board. These assertions were contained in pleadings as there was no evidentiary record. The Petitioner has continued to reiterate these assertions, both in the Circuit Court and in the Petition filed herein. Delta asserts that, "The undisputed facts are . . . that Delta received no request from the committee for many months thereafter."

This is false, as the Arbitrator specifically held, and to so assert here is improper. Clearly, the Board would have decided the timeliness issue had the facts been undisputed, and so held in its Order dated September 23, 1976. (Appendix to Petition, 7c). Therefore, its only course, as supported by consistent decisional authority, was to refer the question to arbitration.

In a dispute arising out of the merger between American Airlines and TransCaribbean Airways, the carrier petitioned the CAB to refer the seniority dispute to a

¹ Included in the Record of this case by Order of the United States Court of Appeals for the District of Columbia Circuit, dated September 28, 1977.

hearing examiner for determination. The Board declined and referred the matter to arbitration. This was approved by the Second Circuit in *American Airlines v. CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015, 30 L.Ed.2d 663, 92 S.Ct. 674 (1972).

"If the Board's experience convinced it that the integration of seniority lists of employees of merging carriers was a function which it was not well suited to perform, and which, in the absence of agreement, had best be left to arbitration, that was a judgment it was competent to make."

And further:

"What the Board can do, an arbitrator appointed pursuant to its order can likewise do." 445 F.2d at 896.

The District of Columbia Circuit Court relied upon *John Wiley & Sons v. Livingston*, 376 U.S. 543, 11 L. Ed.2d 898, 84 S.Ct. 909 (1964); *Tobacco Workers International Union Local 317 v. Lorillard Corp.*, 448 F.2d 949 (4th Cir. 1971); *Rochester Telephone Corp. v. Communication Workers of America*, 340 F.2d 237 (2d Cir. 1965), and held:

"One rationale for approval of the delegation of procedural issues to arbitration is that the substantive and procedural aspects of labor controversies are normally so intertwined that dividing their resolution between arbitrators and courts would cause unnecessary delay and duplication of effort." *John Wiley & Sons v. Livingston*, 376 U.S. at 557-558 (D.C. Cir. Opinion) (Appendix to Petition, 7a).

The lower court further held:

"In this case, it is clear that the dispute over the integration of the seniority lists was arbitrable. CAB Orders 72-5-73/74 (April 24, 1972)." See *American Airlines, Inc. v. CAB*, 445 F.2d at 228. Delta's refusal to participate in arbitration was based on the

procedural contention that no proper request for arbitration of the dispute had been filed with it within the time limits established by Section 13 of the LPP's. Under these circumstances, it can reasonably be said that the Board, after finding the substance of the dispute arbitrable, acted within the scope of its discretion in delegating the procedural question to the arbitrator." (Appendix to Petition, 8a)

Petitioner's reliance upon *Braniff Airways, Inc. v. CAB*, 126 U.S.App.D.C. 399, 379 F.2d 453 (D.C.Cir. 1967) is misplaced in that the court found a variance between the Board's assertion of facts and what the evidence actually revealed. In the instant case, the Board did rely upon the administrative record, which consisted of conflicting assertions, and for that reason, referred the timeliness issue to arbitration. There, an evidentiary record was made in a four-day hearing and the Arbitrator ruled that Delta's alleged uncontested facts were "demonstrably incorrect". (Opinion and Award, June 1, 1977, p. 22). Petitioner continues to allege its own factual contentions which have already been determined adversely to it.

The Petitioner's reliance upon *City of Lawrence v. CAB*, 343 F.2d 583 (1st Cir. 1965) was also rejected by the Circuit Court:

"... We do not believe however, that the Board, by stating its "normal inclination" to decide such issues, was thereby setting a standard for itself from which it could not deviate without being found to have engaged in arbitrary and capricious action. (Citing *City of Lawrence*). Rather, we believe that the Board was recognizing that it had the discretion either to resolve or to delegate the timeliness question, depending upon the adequacy of the record before it and the perceived need for specialized knowledge in labor matters to deal with the question. Furthermore, throughout the prolonged proceedings

leading to this appeal, the Board had consistently stated that Delta's particular timeliness argument should be resolved in negotiations and arbitration." (Opinion n.24) (Appendix to Petition, 8a-9a)

The Circuit Court relied upon *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 28 L.Ed.2d 136, 91 S.Ct. 814 (1971) in applying an abuse of discretion standard to the CAB. This court held:

"Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706 (2) (A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." (401 U.S. at 416)

These are the applicable standards and after a careful review, the Circuit Court found that there was neither an abuse of discretion nor an error of judgment.

Petitioner is less than candid when, at page 18 of the Petition, it quotes the Court of Appeals:

"The undisputed facts before the Board do reveal that the Committee made no formal protest to Delta until many months after the Board's September 1973 decision on TWU's representational capacity."

The Petitioner failed to continue with the pertinent and qualifying language immediately following that quote:

"However, depending upon the arbitrator's resolution of the issues posed by the Board, such a lapse of time could become irrelevant to the final outcome of the timeliness dispute." (Appendix to Petition, 10a)

The Arbitrator's Opinion did in fact find that demands for arbitration had been made immediately upon conclusion of negotiations and that the subsequent delays were attributable to Delta.

CONCLUSION

The Northeast stewardesses have sought a resolution to this seniority dispute for almost six years, since September 28, 1972 when negotiations concluded and the Committee demanded arbitration which was their right under the Labor Protective Provisions contained in the Merger Order by the CAB. (Appendix to Petition, 1i & 11i). The initial refusal by Delta resulted in two petitions to the CAB, two appeals to the Circuit Court, additional proceedings before both the court and the Board, finally culminating in arbitration in March, June and August, 1977. The legal struggle by the 351 former Northeast flight attendants against their employer has been monumental.

It is respectfully submitted that these issues can be finally concluded by this Court's denial of the Petition for Certiorari.

Respectfully submitted,

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